Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MILTON HAMBRICE, INC.,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Milton Hambrice, Inc., filed a malicious prosecution action against State Farm Fire & Casualty Insurance Company in the Western District of Arkansas, and after a four-day jury trial, was awarded $312,000 in compensatory damages and $7,500,000 in punitive damages. The Court of Appeals for the Eighth Circuit remanded to the District Court for entry of judgment as a matter of law in favor of State Farm on the basis that the evidence was insufficient to support the jury verdict.

Malicious prosecution is a suit filed for an improper purpose, without probable cause, resulting in injury to the person sued before the suit is favorably terminated in favor of the injured party. In determining whether probable cause was present to file suit, the defendant is charged with facts it would have known from a reasonable investigation, if beforehand it was put on notice of facts or circumstances which would prompt a reasonable and cautious person to make further inquiry. The Eighth Circuit, however, held that the presence of any evidence against the targeted party was sufficient to support probable cause and prohibit a malicious prosecution action.

The questions presented here are:

> Whether the high level of reversal rates reached by the federal appeals courts in cases involving sufficiency of the evidence, and the corresponding disregard for the re-examination clause and the standard of review enunciated in *Lavender v. Kurn*, 327 U.S. 645 (1946), has resulted in a violation of Petitioner's Seventh

QUESTIONS PRESENTED – Continued

and Fifth Amendment rights in the following particulars:

(1) By the Eighth Circuit's total disregard of evidence supporting the jury verdict and its review of facts in a light most favorable to the losing party; and,

(2) By the Eighth Circuit's misunderstanding of the law and holding that the presence of any disputed fact issue on comparative fault establishes *per se* that probable cause exists to file civil suit, even though facts were known that conclusively precluded a finding of legal liability.

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PETITION FOR WRIT OF CERTIORARI

Milton Hambrice, Inc., the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on May 23, 1997.

OPINIONS BELOW

The opinion of the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 114 F.3d 722 (8th Cir. 1997), and is reprinted in the separate Appendix to this Petition, pp. 1-8. The verdict rendered in the United States District Court for the Western District of Arkansas, entered May 24, 1996, is an unpublished decision, case number 94-1133, decided May 23, 1996.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit was entered on May 23, 1997. The Eighth Circuit denied a timely petition for rehearing on June 27, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Seventh Amendments to the Constitution of the United States, which provide as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment V.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no

> fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

U.S. Constitution, Amendment VII.

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals held that an insurance company that possesses evidence sufficient to skirt summary dismissal will be held unaccountable for filing a malicious civil action even when it knows of facts at the time of filing that preclude a finding of legal liability against the party sued.

Jack Daugherty owned a Western Sizzlin restaurant that was being remodeled. He hired a roofing contractor, Robert Davison, to replace the roof. Other contractors were hired by owner Daugherty for other tasks, one being petitioner, Milton Hambrice, Inc.

While roofing, Davison removed decorative neon bulbs from the perimeter of the building, leaving bare electrical wires exposed. Restaurant customers complained that the bare outside wires were sparking. Owner Daugherty called his electrician, David Arrington, to inspect the wiring. Arrington did so on two occasions. Arrington warned management each time to terminate power to the wires; otherwise, electrical arcing would likely cause a fire. The Western Sizzlin's marquee sign was on the same electrical circuit as the exposed wires, and management disregarded Arrington's warnings and continued to energize the bare wires. Eventually, the restaurant burned on September 18, 1991, a few days after Arrington's second visit and warning.

The loss was insured by State Farm Insurance Company. Its claims adjuster, Mike Tucker, first determined that the fire was an electrical fire. Fire investigator Corky Wright also investigated, and told State Farm five days

after the event that the fire was caused by the electrician. The electrician, however, was also insured by State Farm.

On October 14, State Farm wrote Hambrice, an innocent party, and demanded reimbursement, stating that Hambrice was responsible for the fire. Milton Hambrice immediately responded to State Farm, explaining that Hambrice was not the general contractor for the job, was only doing interior carpentry and siding, and was not responsible for work at the fire origin. He also told State Farm that a lawsuit would injure the business. He insisted upon providing State Farm with a formal statement and company records, if State Farm still looked to Hambrice in any way as responsible. State Farm refused to take a statement and ignored Hambrice's plea to perform additional investigation to determine the legal liability for the fire.

State Farm sent the same letter to the electrician, Arrington, likewise demanding reimbursement, but then learned that Arrington, like owner Daugherty, was an insured of State Farm. At that point, State Farm dropped its claim against Arrington, and attempted to cover up Arrington's involvement in the matter.

State Farm had an aggressive policy toward recoupment of its casualty losses through subrogation. Tucker was under extreme pressure from his supervisor, who advised Tucker that the file would be re-assigned if Tucker continued to have problems. On December 31, 1991, the supervisor requested a status report, which prompted Tucker to immediately hire an attorney to file a subrogation action against Hambrice, the only theoretical defendant not insured by State Farm. Knowing that State Farm could not obtain a judgment against Hambrice, Tucker induced the attorney to file suit by providing him with false information. Tucker advised State Farm's attorney that (1) Hambrice had performed the work on the

roof (when in reality Davison had performed the work on the roof); (2) Arrington had not worked on the system that caused the fire (when in reality Arrington had twice failed to remedy the danger and had specifically warned Western Sizzlin management that energizing the wires would likely cause a fire); and (3) Hambrice had been uncooperative and would not forward the claim to Hambrice's insurance carrier (when in reality Hambrice had been completely cooperative, volunteering a formal statement, and its carrier, USF&G, was talking with State Farm). Induced by this false information, State Farm's lawyer then sued Hambrice to improperly spur Hambrice to file third-party suits against others.

State Farm's complaint alleged that Hambrice had removed the lighting from the building and had negligently caused the building to burn. During routine trial discovery, State Farm's counsel uncovered what State Farm knew but had failed to disclose concerning Arrington's involvement, the owner's contributory negligence, and the fact that Hambrice could not be legally liable for the loss, i.e., could not be subject to judgment. State Farm's counsel reported that just the owner alone was "easily in excess of 50% at fault." The electrician likewise had substantial contributory fault – the two State Farm insureds caused the fire. After 18 months, State Farm finally abandoned the suit against Hambrice, but even then, dismissal was without prejudice. Hambrice incurred substantial defense expenses and sustained damage to its business from the allegations that Hambrice had caused the Western Sizzlin to burn.

Hambrice sued State Farm for malicious prosecution on October 7, 1994, in the Western District of Arkansas. Jurisdiction was based upon diversity of citizenship, 28 U.S.C. § 1332. The jury, after a four-day trial, determined that State Farm had filed suit against Hambrice without

probable cause and with improper motive, and awarded judgment in the amount of $312,000 in compensatory damages and $7.5 million in punitive damages.

The jury verdict was appealed. The Eighth Circuit reviewed the record in a light most favorable to State Farm (the losing party), and disregarded the evidence that supported the jury verdict. The Eighth Circuit determined that the issue of probable cause should have been taken from the jury as a matter of law. All inferences were resolved in favor of State Farm, and Hambrice's claim was reversed and dismissed.

This Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the United States Constitution states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[1]

The latter phrase of the Amendment, sometimes referred to as the "re-examination clause" is one which has received "only a fraction of the judicial and scholarly attention that has been paid to the right to jury trial."[2] However, an analysis of the history of this Amendment, and particularly case law interpreting the re-examination clause, shows that it is Constitutionally significant and that the issues presented in this petition are of paramount importance.

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[1] U.S. Const. amend. VII.

[2] Ayres, *Pregnant with Embarrassments: An Incomplete Theory of the Seventh Amendment*, 26 Valparaiso University Law Rev. 385, 395 (1991).

I. HISTORY OF THE SEVENTH AMENDMENT

A. Constitutional Background

The ratification of the United States Constitution was almost defeated by a failure of the drafters to preserve the sanctity of the jury trial. On September 12, 1787, five days before the constitutional convention was to adjourn, Mr. Hugh Williamson, Delegate from North Carolina, observed that "no provision was yet made for juries in Civil cases and suggested the necessity of it."[3] A suggestion that a clause be inserted in Article III, Sec. 2, (providing a right to jury trial in criminal cases), and a follow up suggestion to adopt a Bill of Rights modeled on various state Declarations of Rights, was subsequently defeated.

Anti-Federalists seized upon this deficiency in their ensuing campaign against ratification. Reasons given for their desire to preserve the jury trial were (1) to counterbalance judicial bias in suits by average citizens against the government,[4] or by wealthy and powerful litigants;[5] (2) to protect debtor defendants who would be sued under the diversity and alienage jurisdictions from forum bias;[6] (3) because juries were thought to be harder to corrupt than regular sitting judges;[7] and (4) because the

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[3] 2 M. Farrand, *Records of the Federal Convention of 1787*, at 587 (rev. ed. 1937).

[4] *Id.* at 708.

[5] A. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 152 (1991).

[6] C. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 673-705 (1973).

[7] Wolfram at 710.

jury system was perceived as an essential element of a participatory democracy.[8]

Patrick Henry, in speaking against ratification to the Virginia Constitutional Convention, stated:

> Trial by jury is the best appendage of freedom . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.[9]

The lack of a Constitutional provision for civil jury trials provided strong ammunition for the Anti-Federalists, who almost defeated adoption of the Constitution. The Federalists ultimately prevailed by declaring that the lack of such a guarantee was a problem of draftsmanship, and by repeatedly promising to correct the deficiency as one of the first orders of business of the new Congress.[10] "The price of approval of the Constitution in many states was the appending of a list of proposed amendments to the Constitution or agreeing to declarations of rights," one of which was the Seventh Amendment.[11] The Amendment was subsequently adopted as part of the Bill of Rights. Although this Court has addressed the appropriate standard of review for the re-examination clause, *infra*, the substantive rights established by the re-examination clause have now been radically diminished by the

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[8] Scheiner at 153-156.

[9] *Galloway v. United States*, 319 U.S. 372, 398 (1943) (Justice Black, with Justice Douglas and Justice Murphy, dissenting) (quoting 3 Elliot's Debates, 324, 544) (emphasis omitted).

[10] Wolfram, *supra* n.6, at 666.

[11] *Id.*at 725.

multiple interpretations and misapplications of that standard by the various federal circuits.

B. Judicial Application of the Seventh Amendment

Originally, re-examination of a jury's findings of fact could only be accomplished by granting a new trial. *Parsons v. Bedford*, 28 U.S. 433, 448 (1830). In 1850, this Court for the first time allowed facts to be reviewed by upholding a trial court's directed verdict in *Parks v. Ross*, 52 U.S. 362 (1850). From that time forward, the Court has allowed a steady expansion of judicial control, resulting in a review much broader than that envisioned in 1791.

The reigning formulation of the standard of review is found in *Lavender v. Kurn*, 327 U.S. 645 (1946):

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a

> contrary inference or feel that another conclusion is more reasonable.

Id. at 652-53.

The expansion from allowing a demurrer (the right at English Common Law) to allowing a directed verdict has not gone without criticism. Justice Black's dissent in *Galloway, supra* n. 11, noted as early as 1943 that "[t]oday's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Id.* at 1090. Schnapper, in his review of appellate court decisions on sufficiency of the evidence from October 1984 to October 1985, notes a new-found tendency of appellate courts to act as "superjurors," redeciding cases rather than deferring to the jury's verdict.[12] The problem, according to Schnapper, is compounded by the fact that since 1968 this Court has discontinued review of circuit court reversals for Seventh Amendment violations.[13] In *Hello Eighth Circuit, Goodbye Seventh Amendment: An Epilog to Christine Craft v. Metromedia*, 55 UMKC L. Rev. 32, Roger M. Baron (1986), the author observed at p. 42 that "[a] new era has come and . . . the United States Supreme Court has not continued its vigilant watch over encroachments upon the Seventh Amendment by the courts of appeals or state supreme courts." This failure to review courts of appeals decisions has spawned an inconsistent, unpredictable variety of standards for reviewing the jury verdict, and a continued erosion of what was once considered "[a] right so fundamental and sacred to the citizen."[14]

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[12] E. Schnapper, *Judges against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wisconsin Law Rev. 237, 256.

[13] *Id.* at p. 245.

[14] *Jacob v. City of New York*, 315 U.S. 752, 752-753 (1942).

> Keeping in mind the heretofore vigilant Supreme Court was the watchdog of intruding appellate courts, one cannot help but question the propriety of allowing the same appellate courts to now serve as judges of their own compliance with the Seventh Amendment.[15]

II. Standards of Review

What should be simple has been made complicated by the various circuits. The essence of the standard is enunciated in Childress and Davis, *Federal Standards of Review,* (2nd Ed., 1992):

> Whether the evidentiary basis is sufficient to support the verdict most often is tested in the federal courts by a *reasonableness* measure, and all circuits display cases applying such a test. The standard has several slightly different formulations (even within circuits), including testing the verdict by a reasonable man or reasonable conflict standard, but proper review, in essence, boils down to a test easier to recite than apply: *could reasonable minds reach different conclusions on the evidence as presented?* If so, the motions should be denied and the evidence on appeal deemed sufficient.

Id. at pp. 3-7, 3-8 (emphasis supplied).

The genesis of this formulation is found in *Lavender,*[16] which states that "only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."[17] While this Court has adhered to the strictures of *Lavender*, the federal circuits have not.

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[15] Baron at 42.

[16] *Supra,* p. 8.

[17] *Lavender,* 327 U.S. at 653.

This Court reiterated the "complete absence of probative facts" standard in 1947,[18] 1957,[19] and in 1963,[20] and the opinions of this Court have repeatedly emphasized the importance of this standard. Since *Lavender*, this Court has not reversed a single jury verdict on the basis that the weight of the plaintiff's evidence was insufficient. On the contrary, in every case reviewed where the plaintiff had adduced *at least some evidence* to support a disputed claim of fact, this Court held that juries' conclusions are absolutely determinative.[21]

The rhetorical question derived from the following statistics is whether this Court's 29-year silence on cases involving the sufficiency of the evidence has allowed the circuit courts to stray from the Court's mandate in *Lavender*. During the three decades prior to 1968, this Court granted certiorari in 25 cases in which a federal appeals court, because of an asserted lack of evidence, had overturned a jury verdict. This Court voted to reinstate the jury verdict in 24 of those 25 cases, or 96%. Likewise, this Court granted certiorari in 27 state-decided Federal Employers' Liability Act cases, in which the state appellate courts had overturned the jury verdict. Of those 27, this Court reinstated 25, or 93%.[22] Justice Douglas, in a concurring opinion in *Harris v. Pennsylvania R.R.*, 361 U.S. 15 (1959), stated that the Court should continue to hear these types of cases as being required by the "vigilance we should exercise in safeguarding the jury trial – guaranteed by the Seventh Amendment. . . . " *Id.*, at 17.

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[18] *Meyers v. Reading Co.*, 331 U.S. 477, 485 (1947).

[19] *Herdman v. Pennsylvania R.R.*, 352 U.S. 518, 519 (1957).

[20] *Basham v. Pennsylvania R.R.*, 72 U.S. 699, 700 (1963); *Dennis v. Denver & Rio Grande W.R.R.*, 375 U.S. 208, 210 (1963).

[21] Schnapper at 264.

[22] Schnapper at 241.

The principle that a jury verdict should not be disturbed was so entrenched that in *Int'l Terminal Operating Co. v. Nederl*,[23] the Court summarily reversed a Second Circuit decision overturning a jury verdict. In its opinion, this Court announced that "[u]nder the Seventh Amendment, the [disputed factual] issue should have been left to the jury's determination." This *per curiam* opinion contained no indication of any plan to change the review process.

For 29 years, the circuits have been policing themselves without contemporaneous guidance from this Court. As a result, the circuits are applying various standards with considerable disregard for the protections of the Seventh Amendment, a right thought so substantive that it was made a part of our Constitution.

III. Effect of This Court's Lack of Guidance

According to the Administrative Office of the Courts, 51,522 appeals were terminated in the federal appeals courts for the twelve-month period prior to March 31, 1997. Of those, 2,432, or 9.1%, were reversed. Among private civil cases filed and terminated, 13.2% were reversed. The cases reversed, by percentage, range from a low of 4.3% in the First Circuit to a high of 18.0% in the District of Columbia Circuit.[24] Should such a broad discrepancy exist?

In his 1989 article, Schnapper noted that federal appeals courts were overturning jury findings at an astonishing rate without regard to Seventh Amendment

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[23] 393 U.S. 74 (1968).

[24] Table B-5, Courts of Appeals, Appeals Terminated on the Merits by Circuit During the Twelve-Month Period Ending March 31, 1997, Administrative Office of the Courts. (App. 12-15.)

jurisprudence.[25] In 102 out of 208 cases (49%) decided during the period of October 1984 to October 1985, the federal appeals courts found that there was insufficient evidence to support the jury's verdict on either liability or damages.[26]

Compare this reversal rate of 49% with this Court's application of the standard of review. In the three decades prior to 1968, this Court upheld 93% of appeals from state courts and 96% of appeals from the federal circuits that were reviewed for sufficiency of the evidence. Recent data indicates the trend continues. Of the 41 cases reviewed by the Eighth Circuit in calendar year 1996 for sufficiency of the evidence, 16 were reversed, or 39%.[27]

It is hypocritical to state that the right to jury trial is essential to preserve the sanctity of the justice system, while the Court of Appeals finds more than one-third of the juries within the Eighth Circuit had reached a conclusion and verdict that was not supported by any conceivable interpretation of the evidence.

Hambrice would have had a better chance of affirmance in a different federal appeals court, yet the odds of reversal should not vary (more than some expected statistical deviation) by circuit. However, this variance is to be expected because there is disagreement among the circuits as to what evidence should be considered when reviewing a jury verdict. Some look at all the evidence, some look only at evidence supporting the verdict and that evidence which is "uncontradicted," and the Eighth

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[25] Schnapper, *supra*, fn. 13.

[26] *Id.* at 234-237.

[27] A list of these cases, and their disposition, is found at App. 16-18.

Circuit purportedly looks only at evidence that supports the jury verdict.

Besides the variety of standards among the circuits for reviewing jury verdicts, the circuit courts do not even follow their respective standards of review, but instead merely do as they please. As Schnapper observed:

> Equally significant, there is no perceptible correlation between the standard which a panel applies and the result which it reaches . . . [T]hese formulations do not function as legal standards at all, but are merely rhetorical flourishes which open or close each opinion.[28]

In 1991, Cynthia J. Cohen wrote about the erosion of the Seventh Amendment protections noting that "[t]he second clause of the Amendment, which restricts judicial review of jury findings, appears to be held in particularly low esteem."[29] She concludes, "[i]f the present state of the Seventh Amendment is any indication, the role of the jury as an institution in our society is already significantly eroded."[30]

With the astonishing number of jury verdicts reversed by the Eighth Circuit, and the remarkable discrepancy in reversal rates among the circuits, it is apparent that federal appeals courts are not giving jury verdicts due deference as required by the Seventh Amendment. There is a lack of consistent application of the standards by the circuit courts, and to a degree, this is a direct result of a lack of guidance from this Court. If jury verdicts were given the deference due under the Seventh Amendment, and if the *Lavender* standard was

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[28] Schnapper at 279.

[29] Cohen, *Whatever Happened to the Seventh Amendment?*, Boston Bar Journal, November/December 1991, pp. 17, 18.

[30] *Id.*

uniformly followed, these discrepancies among the circuits would not exist.

IV. Due Process Implications

The Fifth Amendment right to due process is implicated in this action as well. "The federal guarantee of due process extends to a state action through its *judicial* as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Faris Trust & Savings Co. v. Hill.*[31] Although in *Brinkerhoff*, the Court was dealing with a violation of the Fourteenth Amendment due process clause, the similarity between the Fourteenth and Fifth Amendment due process clauses is recognized. This Court has frequently indicated that validity of federal legislation under the due process clause of the Fifth Amendment is tested by the same rules of equality that are employed under the Fourteenth Amendment equal protection clause.[32]

It has been said under this analysis that the Fifth Amendment forbids discrimination by the federal government that is "so unjustifiable as to be violative of due process."[33]

Given the foregoing statistical information, it is apparent that those similarly situated, i.e., successful parties following a jury trial on disputed facts, are being treated differently at the federal appeals court level. According to Schnapper, *supra*, the Ninth Circuit had the lowest reversal rate at 11.1%, while the Second Circuit

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[31] *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930) (emphasis supplied).

[32] See, e.g., *Delaware Travel Business Committee v. Weeks*, 430 U.S. 73 (1977), reh. den., 431 U.S. 960 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

[33] *Wineberger v. Weisenfeld*, 420 U.S. 636 (1975).

reversed 70% of cases on sufficiency of the evidence, and the Federal Circuit had reversed four of four, or 100%, for the time frame studied. These discrepancies are not merely normal fluctuations. As apparently in the case at bar, federal appeals courts may choose to reverse a verdict based upon their personal inclinations about the case, and ignore substantial evidence that supports the verdict.

V. Effect of Seventh Amendment Discord on this Case

In concluding that Milton Hambrice, Inc., had provided evidence insufficient for a "reasonable jury to have found"[34] for it, the Eighth Circuit adopted an adversarial stance, rather than reviewing the verdict in a light most favorable to the prevailing party. Specifically, the Eighth Circuit violated its own standard of review by supplanting its conclusions for those of the jury, by failing to acknowledge the body of evidence that supported the verdict, and by misapplying Arkansas law of malicious prosecution. This deficient review violates the prohibition against Seventh Amendment re-examination.

A. Sufficiency of the Evidence.

In reversing the jury, the Eighth Circuit paid lip service to its obligation, mentioning "[a] jury verdict will be upheld if the evidence, viewed in the light most favorable to the prevailing party, is sufficient for a reasonable jury to have found for that party."[35] Yet, the Eighth Circuit paid little heed to this standard.

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[34] *Hambrice v. State Farm Fire & Cas.*, 114 F.3d 722, 724 (8th Cir. 1997).

[35] *Id.*

To establish the tort of malicious prosecution under Arkansas law, a plaintiff must show: (1) a proceeding brought or maintained by the defendant against the plaintiff, (2) termination of the proceeding in favor of the plaintiff, (3) absence of probable cause for the proceeding, (4) malice on the part of the defendant, and (5) damages. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 368 (1996). Probable cause is based upon "the existence of facts or credible information" that would cause a person of ordinary caution to believe a defendant liable. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 640 (1993). "Ordinary caution is a standard of reasonableness, which presents a question of fact for the jury when proof is in dispute or subject to different interpretations." *Parker v. Brush*, 276 Ark. 437, 439 (1982).

The Eighth Circuit found that State Farm acted "reasonably" in filing suit against Hambrice, and therefore had probable cause to institute the action, and that Hambrice failed to produce evidence of malice. The following shows that the Eighth Circuit's recitation of "undisputed evidence" is anything but, and that the jury reasonably reached the determination that State Farm had maliciously filed suit against Hambrice without probable cause.

(1) Direct Evidence of Lack of Probable Cause.

The fire occurred on September 18, 1991. Why did it happen? The jury heard that:

(a) Roofer Davison removed the neon lights and owner Daugherty stored the lights;

(b) Electrician Arrington was summoned twice by Daugherty due to electrical arcing; he found some electrical defects, warned Daugherty, but failed to cure the fire danger;

(c) The owner ignored the electrician's warning that the neon wiring was dangerous and could cause a fire;

(d) The owner continued to power the circuit to the neon wiring until the fire occurred (supplying power nightly to the Western Sizzlin highway sign);

(e) With these facts, State Farm's attorney was of the opinion that Daugherty, the insured owner, was easily more than 50% at fault for the fire.

On September 19, Tucker, claims adjuster for State Farm, went to the scene to inspect the damage. Present were the owners of Western Sizzlin, Jack Daugherty and his son. Daugherty testified that there was nothing he told Tucker at that time that would have prompted State Farm to file suit against Hambrice and that he told Tucker *everything of relevance* about the fire. Tucker retained a fire scene investigator, Corky Wright, and an electrical engineer, Austin Bolin, to examine the scene. On September 23, 1991, Tucker received word from Wright that the "fire was accidental but caused by electrician." That notation in the State Farm file allowed the jury to conclude that State Farm sued Hambrice, even though it knew that the electrician, also its insured, had caused the fire.

State Farm experts had no independent information on legal causation. All witnesses agreed that they were "cause and origin" experts only. One written expert report was greatly relied upon by the Eighth Circuit, but it contained purported facts provided by none other than State Farm personnel and its insured owner. The jury was thus entitled to disagree with the reasonableness of State Farm's reliance upon this report.

On October 14, Tucker sent subrogation letters to Hambrice and Arrington, the electrician, indicating State Farm's dual position that each was singularly responsible

for the fire. Arrington, an insured of State Farm, took the Tucker letter to his local State Farm agent, Trexler. Trexler told Arrington not to worry, that he would take care of him.

Upon receipt of his letter, Milton Hambrice immediately contacted Tucker and had an eleven-minute conversation, during which time he emphatically explained why Hambrice could not be responsible for the fire. Tucker was told that Hambrice had been working solely on carpentry, that none of his people had worked where the fire began, and that all of his records were available for review. He told Tucker that, as a regional contractor, even rumor of a lawsuit would damage his business. He then requested that a *statement* be taken of him. Tucker previously denied that this conversation ever occurred. Telephone records introduced at trial, however, forced Tucker to admit that the conversation had occurred.

Tucker did nothing to follow up on the information provided by Hambrice, which put State Farm on inquiry notice. In fact, Tucker did nothing further to determine legal cause, period. In December, a USF&G claims agent contacted State Farm. The USF&G agent testified that he had told State Farm that Hambrice was not the general contractor, that Daugherty was acting as his own general contractor, and that Hambrice had nothing to do with the area where the fire began. Still ignoring all contradictory facts and with nothing further learned, the file was sent to a law firm with instructions to sue Hambrice. Tucker's claim activity log was admitted into evidence which proved he did nothing to determine liability between the time he mailed the unsubstantiated subrogation demands in October and the date suit was filed.

Based upon the foregoing, a jury could easily have concluded that, at the time State Farm's Tucker sent the

insurance claim file with instructions to sue Hambrice, Tucker knew that:

1. The electrician caused the fire;
2. The electrician was insured by State Farm;
3. The insured owner contributed to the cause of the fire;
4. The owner was acting as his own general contractor;
5. Hambrice offered full cooperation with the investigation;
6. The liability carrier for Hambrice had contacted State Farm; and
7. Tucker had lied to an attorney to induce the filing of suit.

On this information, the Eighth Circuit somehow concluded that the jury had erred in finding State Farm lacked probable cause in suing Hambrice.

Probable cause has been defined by the Arkansas Supreme Court as follows:

> Probable cause for prosecution must be based upon the existence of facts or credible information that would induce the person of ordinary caution to believe the accused person to be guilty of the crime for which he is charged. "Ordinary caution is a standard of reasonableness, which presents a question for the jury when the proof is in dispute or subject to different interpretations. *Parker v. Brush*, 276 Ark. 437 (1982). See also *Malvern Brick & Tile Co. v. Hill*, 232 Ark. 1000 (1961)."

Cordes v. Outdoor Living Center, 301 Ark. 26, 31 (1989).

State Farm was required to act with ordinary caution in forming a belief as to guilt, and only rely on credible information. The Eighth Circuit found State Farm was reasonable in its reliance upon an alleged version of

events by Daugherty, though Daugherty testified that he told State Farm nothing that would have prompted State Farm to sue Hambrice. State Farm's claim file does not refute this. There was evidence presented that *it is not reasonable for the carrier to rely solely upon the insured to establish facts supporting liability, if there is an alternative source.* The insured is typically unreliable because of his vested interest in the outcome and, when the loss is significant, severe shock. The jury could have concluded that State Farm had acted unreasonably in relying on this information. Likewise, the jury could have found that State Farm acted irresponsibly in not seeking out and interviewing any available disinterested witnesses. Tucker testified that although he was aware of the roofer's involvement in the remodeling project, he did not interview the roofer even when he knew the fire began on the roof! In spite of all of this, the Eighth Circuit stated "it was reasonable for State Farm to believe that Hambrice was responsible for the fire," drawing conclusions that the jury, when the above is considered, obviously would not.

(2) State Farm is charged with knowledge of the facts which absolved Hambrice.

Arkansas law required State Farm to uncover reasonably available facts relating to its claim before suing Hambrice *when it became aware of contradictory facts giving rise to a duty to investigate further. Kansas & Texas Coal Co. v. Galloway,* 71 Ark. 351 (1903).

> When the facts or circumstances known to the prosecutor are of such a nature as would put a reasonable and cautious person upon inquiry, the prosecutor will be held to have knowledge of such facts as inquiry would have disclosed,

> and such facts should consequently be considered in determining whether a probable cause existed.

Id. at 360-361.

Subsequently, in *Parker v. Brush, supra,* the Arkansas Supreme Court stated:

> Parker first contends that according to the undisputed evidence, he had probable cause for prosecuting Ronnie and was therefore entitled to a directed verdict. The trouble is, probable cause must be based upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. Ordinary caution is a standard of reasonableness, which presents an issue for the jury when the proof is in dispute or subject to different inferences. *Here it was for the jury to say whether Parker acted with reasonable caution in accepting Polk's disputed statements as to the truth, instead of taking further steps to get to the bottom of the dispute between Polk and Ronnie. The jury's verdict has settled that issue against Parker.*

Id. at 439. (emphasis supplied). *See also First Commercial Bank v. Kremer,* 292 Ark. 82 (1987) (where defendant was in possession of facts which would have exonerated plaintiff, jury is entitled to consider that information to determine if ordinary caution was exercised); *Wal-Mart Stores, Inc. v. Yarbrough,* 284 Ark. 345 (1984) (submission of malicious prosecution action to jury was proper where defendant made no effort to listen to, or believe, explanation of plaintiff).

The essence of probable cause is not whether there was any evidence of fault against the defendant. Rather, probable cause is whether evidence existed which would cause a reasonable person to conclude that a judgment could be obtained against a defendant for his fault. In this case, the Eighth Circuit stated equivocally, *"there do not*

appear to be any facts giving rise to a duty to investigate further, but even if there were, the additional evidence which Hambrice claims State Farm should have uncovered does not *necessarily* negate State Farm's evidence of Hambrice's negligence." *Hambrice*, at 725 (emphasis supplied).

The Eighth Circuit goes on to note that "uncovering evidence of Daugherty's negligence would not have vitiated State Farm's probable cause concerning Hambrice's negligence. State Farm could still have had a submissible case in the subrogation action, since under Arkansas law issues of comparative negligence are for the jury to decide." *Id.*, citing *Lockett v. Int'l Paper Co.*, 871 F.2d 82 (8th Cir. 1989).[36] *This is dead wrong* and is at the heart of why this Court must take action.[37]

It has been explained how a jury could have concluded that at the time of filing no reasonable person could have believed that a judgment was obtainable against Hambrice. State Farm could have gotten the same facts merely by asking, but it did not want the facts uncovered. The Eighth Circuit failed to address the roofer's testimony that it was in fact he who removed the lights. The roofer testified that he was working under the direct control and supervision of owner Daugherty, that he removed the lights at the direction and control of Daugherty, that he removed the lights with Daugherty's assistance, and that Hambrice had nothing to do with the roofer's performance. The jury could reasonably have concluded that *regardless of any conduct on behalf of Daugherty in failing to turn off the electricity*, there was exculpatory evidence easily obtainable by State Farm that

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[36] See fn 41, *infra*.

[37] The effect of this incorrect interpretation is discussed at Section B, infra.

Hambrice's explanations, if given due regard, would have established. The jury could have concluded that if State Farm had interviewed the roofer, available management, and Arrington, and had viewed company records and taken Hambrice's statement, as requested, it would have learned as a reasonable and cautious person of facts leading to the same exoneration of Hambrice that was later pronounced by its lawyer. Under *Galloway, supra*, State Farm is charged with knowledge that it would have received from conducting such an interview. A proper investigation could only have revealed the truth; State Farm insured owner Daugherty, State Farm insured electrician Arrington, and roofer Davison comprised the entire ensemble of actors who put in motion the events that led to the fire.

The Eighth Circuit arbitrarily focused on the evidence that tended to show fault with Hambrice, and ignored all evidence that supported the verdict. "Where there is a view of the case that makes the jury's answers . . . consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment."[38]

(3) Malice

Malice is "any improper or sinister motive for instituting a lawsuit." Based upon the facts above, a jury could reasonably have found malice on behalf of State Farm. State Farm, through sales agent Trexler, accepted the statement of the electrician when he professed his innocence. Arrington told the jury that his State Farm agent said that he would "take care of it." Trexler was not

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[38] *A&G Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962).

called in rebuttal. "The failure of a party to testify in a civil case about facts peculiarly within his knowledge is a circumstance which may be looked upon with suspicion by the trier of fact." *Allred v. Demuth*, 319 Ark. 62, 67 (1994). "The failure to testify gives rise to the presumption that the testimony would have been against the party's interest." *Id.* The jury reasonably concluded that State Farm acted with malice by turning a deaf ear to someone *not* a State Farm insured, and by going out of its way *for* a State Farm insured to "take care of it," yet the Eighth Circuit disregarded these conclusions.

Moreover, State Farm's stated purpose of filing suit was to determine whether and in what amount Hambrice had insurance coverage, *and to shift to Hambrice the burden of establishing liability for the fire and join third parties.* It was improper for State Farm to sue Hambrice to off-load its investigation responsibilities.

The jury could have concluded that the most damning evidence of malice was Tucker's lie to the attorney that Hambrice had refused to turn the claim over to its insurance carrier. The jury could have further concluded that Tucker lied to the lawyer in stating that Hambrice was uncooperative. The testimony was that Hambrice had volunteered his statement and all his records to State Farm. Tucker knew the State Farm electrician had been out on two occasions to repair a system that was *the cause of the fire*, and knew a third party, the roofer, was part of the remodel project. A jury could conclude that Tucker omitted essential facts, and deceived his attorney so it would appear that the electrician had not worked in the area where the fire occurred. These lies and deceit permitted the jury to conclude that State Farm's motive for misrepresenting the facts was malicious.

B. Misapplication of Arkansas Law.

The Eighth Circuit misapplied Arkansas law for the apparent purpose of protecting a perceived public interest. The Eighth Circuit reasoned that Hambrice could not show that State Farm lacked probable cause to sue for subrogation, because any negligence of Hambrice created a submissible issue for the jury and comparative negligence is an issue for the jury to decide. *Hambrice* at 725. The Eighth Circuit mistakenly relied upon *Lockett, supra,* confusing the concept of a submissible issue of comparative fault which could result in a judgment, with merely some evidence of comparative fault that nonetheless could not result in a judgment.[39] The Arkansas Supreme Court has recognized this fundamental distinction:

> This Court has consistently reaffirmed the holding that it is for the jury in a comparative negligence case to determine the negligence of each party. However, we have also adopted the rule that the issue should be *taken from the jury* "when the proof of one party is so clear, convincing and irrefutable that no other conclusion could be reached by reasonable men."

Wheeler v. Bennett, 312 Ark. 411, 415 (1993) (emphasis supplied) (citations omitted).

For the Eighth Circuit to say that just the presence of issues of comparative fault defeats an action for malicious prosecution is just very, very wrong. Otherwise, in order to have a cause for malicious prosecution, there must not be any submissible issue for the jury in the underlying lawsuit. Yet, if that were the law, it would mean that one of the elements of malicious prosecution, "favorable termination," could be met *only* by summary judgment, directed verdict, j.n.o.v., or abandonment. This is not the law of malicious

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[39] See fn. 34, *supra.*

prosecution. The RESTATEMENT (SECOND) OF TORTS, § 674, Comment j (1965) recognizes that civil proceedings are "terminated in favor" of the person against whom they are brought following "the favorable adjudication of the claim by a competent tribunal." If the other elements are met, malicious prosecution suits may routinely follow a case that has gone to trial with judgment rendered for the defendant-in-the-underlying-lawsuit. *Favorable termination*, by any means other than settlement, is the condition precedent to a malicious prosecution action. Whether there was "sufficient evidence" to go to the jury is totally irrelevant. The Eighth Circuit has confused an element of the cause of action with civil procedure.[40]

To illustrate, if the presence of an issue of comparative fault established probable cause as a matter of law, State Farm could still have instructed its attorney to file suit, even though knowing that Daugherty alone was *"easily in excess of 50% at fault,"* and there would be no consequence relating to malicious prosecution. In this case, State Farm had facts known or available that would have shown there was no possibility of obtaining a judgment against Hambrice. With no chance of a judgment against Hambrice, there was thus no probable cause to sue.[41]

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[40] When a motion for directed verdict is made, the evidence is viewed in a light most favorable to the non-moving party. Thus, if all inferences are drawn in favor of the non-moving party, the case should go to the jury. The existence of probable cause is determined completely differently. It is determined not by examining the evidence in a light most favorable to the non-moving party, but by deciding if a reasonable person, on notice, would have a reasonable expectation of obtaining a judgment against the targeted person.

[41] If the owner had been judged more than 50% at fault, State Farm could not have recovered. Ark. Code Ann. § 16-64-122 (1987).

The Eighth Circuit's Opinion was tainted by this misunderstanding of the law. During oral argument, the Court questioned both State Farm's counsel and counsel for Hambrice as to the effect of *Lockett* on the case. In fact, the Court forecast its misunderstanding that a case which contained submissible issues to the jury could be the subject of a later malicious prosecution action:

> The Court: You mean I can bring a case strong enough to get to the jury and still be liable for malicious prosecution?

It is apparent that this issue was at the forefront of at least one panel member's mind, and affected the entire review of the case. Once it was decided that the presence of evidence of a submissible issue precluded a finding a lack of probable cause, then the abundance of the evidence which supported the jury verdict was ignored. This critical misunderstanding of the law resulted in an extreme injustice to Hambrice, as the Seventh Amendment, as well as the facts in this case, were given short shrift.

The effect of the Eighth Circuit decision is to affirm an entitlement of insurance companies to bring subrogation actions with no more that a scintilla of evidence against the targeted party. However, while recognizing the legality and propriety of subrogation generally in society, and its importance to the insurance industry in particular, the Eighth Circuit's implied approval of a subrogation policy that promotes filing actions without concern by the insurer for economic harm to the target's wellbeing, rather than from a reasoned and considered pre-trial investigation, is a threat to an already overburdened judicial system and an affront to society and the jury system.

CONCLUSION

> The right of a jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, *should be jealously guarded by the courts.*

Jacob v. City of New York, 315 U.S. 752 (1942) (emphasis supplied).

The jury trial has historically been recognized as an almost sacred right. However, in the past 30 years or so, the guardians of Seventh Amendment strictures have been the federal appeals courts exclusively. This has resulted in an improper review of jury verdicts which, although represented by standard language in opinions, often goes beyond standards set forth therein, to constitute a complete and utter re-examination of the evidence. The time has come for this Court to exercise its watchdog function and protect a fundamental right. For, as noted by Justice Black in his dissent in *Galloway v. United States*:

> Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: "Such a reversal of opinion [as that of a particular state court concerning the jury function] if it were isolated, might have little significance, *but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and Constitutions, there is revealed one aspect of the basic confluent in the legal history of America – the conflict between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges.*

Galloway, supra, at 1095 (emphasis supplied).

This case goes beyond the limited concerns of Milton Hambrice, Inc. It clearly establishes a willingness on the part of federal appeals courts to disregard significant evidence, weigh certain evidence contrary to permissible inferences of the jury, and draw their own conclusions as to the facts under the guise of reviewing them "as a matter of law." This type of unfettered review should be restricted by this Court, and the various applications of the standards of review on appeal of a jury verdict should be consolidated to one, universally-accepted standard. The decision of the Eighth Circuit, denying petitioner his Seventh Amendment right to jury trial, and revisiting the facts in contravention thereof, should be reversed, and this matter should be remanded to the Eighth Circuit for further proceedings.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2985

Milton Hambrice, Inc., Plaintiff/Appellee, v. State Farm Fire & Casualty Company, Defendant/Appellant.	* * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: April 14, 1997

Filed: May 23, 1997

Before RICHARD S. ARNOLD, Chief Judge, FAGG and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

State Farm Fire and Casualty Company (State Farm) appeals from a judgment awarding Milton Hambrice, Inc. compensatory and punitive damages for a claim of malicious prosecution. Hambrice, a contractor on a restaurant remodeling project, was sued by State Farm in a subrogation action after a fire extensively damaged the restaurant during the remodeling. After State Farm later voluntarily

dismissed its action, Hambrice brought this case. A jury returned a verdict for Hambrice, awarding it $312,000 in compensatory damages and $7,500,000 in punitive damages. The district court denied State Farm's post-trial motions, and judgment was entered in the amount of the verdict. We reverse and remand.

In the summer of 1991 Hambrice was hired by Jack Daugherty, the owner and a State Farm insured, to act as general contractor for the remodeling of a Western Sizzlin' restaurant in Magnolia, Arkansas. Daugherty later reassumed some of the work, including roofing and electrical work, but Hambrice continued to assist Daugherty on it. Hambrice estimated the amount of roofing material required and ordered those materials for Daugherty, checked the roofer's work on two occasions, and suggested to Daugherty that the perimeter neon lighting be removed after noticing that it could be damaged by the shingle removal. When the lighting was removed, the wires which supplied electricity to the lights were left exposed and dangling along the side of the building.

Shortly before the fire in the restaurant occurred, customers reported arcing and sparks from the exposed wires to two restaurant managers, Brian Daugherty (Jack's son) and Leigh Bass. On both occasions, David Arrington, the restaurant's regular electrician, was called to the scene. Arrington told Bass that the sparking was a danger and that the wires could be a fire hazard unless the circuit was left off. Power continued to be applied to the circuit every night, however, until the fire on September 18, 1991, which resulted in extensive damage to the restaurant.

State Farm paid Daugherty's claim and hired a fire investigator and an electrical engineer to look into the cause of the fire. They determined that hanging wires from the removed neon lights were the cause, and the fire investigator reported that "the neon tubes had been removed by Mr. Milton Hambrice . . . and David Arrington, an electrical contractor" so that new siding could be installed. A State Farm claims adjuster, Mike Tucker, also interviewed Daugherty and his son, Brian. The Daughertys told the adjustor that Hambrice was the general contractor on the remodeling job and that an employee under Hambrice's supervision had removed the lights. In its investigation State Farm did not uncover the fact that Arrington had on two occasions warned Bass about the danger from the exposed wires and told him to make sure that power was not applied to the cables.

After receiving this information, Tucker sent letters to Hambrice and Arrington, which stated: "Our investigation indicates that you are responsible for this damage and we are therefore looking to you for reimbursement." When Hambrice received the letter, he called Tucker and denied responsibility for the fire. Arrington, who was also insured by State Farm, called his agent and told him that he had not removed the neon lights and had only been called to the restaurant about sparking of other cables in a different location from the fire's origin. Daugherty confirmed the facts in Arrington's statement, and State Farm did not pursue a claim against Arrington. State Farm then forwarded the case file to Mike Huckabay, an attorney who had extensive experience handling subrogation claims, for recommendations on whether to file suit against Hambrice. Huckabay responded that he

"strongly recommended" suing Hambrice, and he filed a complaint in February 1992, alleging that Hambrice's negligence caused the fire at the restaurant.

State Farm and its attorneys remained unaware of Arrington's warnings about the wires until May 1993, when a State Farm attorney interviewed Bass. Bass told the attorney about Arrington's visits and warnings, and Arrington was deposed and affirmed that he had made strong warnings about fire danger from the exposed wires. After discovering this evidence, Huckabay recommended that State Farm voluntarily dismiss the lawsuit because Daugherty would probably be found to be more than fifty percent at fault, thus precluding recovery under Arkansas comparative negligence law. State Farm dismissed the suit without prejudice in June 1993.

Hambrice then sued State Farm for malicious prosecution, and after a jury trial, judgment was entered against State Farm. On appeal, State Farm argues that Hambrice did not establish its malicious prosecution claim, that the district court made errors in admitting evidence and in the jury instructions, that Hambrice did not prove compensatory or punitive damages, and that excessive damages were awarded.

In order to establish malicious prosecution under Arkansas law, a plaintiff must show: (1) a proceeding brought or maintained by the defendant against the plaintiff, (2) termination of the proceeding in favor of the plaintiff, (3) absence of probable cause for the proceeding, (4) malice on the part of the defendant, and (5) damages. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 922 S.W.2d 327, 331 (Ark. 1996). A jury verdict will

be upheld if the evidence, viewed in the light most favorable to the prevailing party, is sufficient for a reasonable jury to have found for that party. *Feibelman v. Worthen Nat'l Bank, N.A.*, 20 F.3d 835, 837 (8th Cir. 1994).

State Farm argues that Hambrice did not show that it lacked probable cause when it filed the subrogation suit. Probable cause is "based upon the existence of facts or credible information" that would cause a person of ordinary caution to believe the defendant is liable. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 846 S.W.2d 176, 178 (Ark. 1993). The facts and circumstances surrounding the commencement and continuation of the suit are considered in determining whether probable cause existed. *Cordes v. Outdoor Living Ctr., Inc.*, 781 S.W.2d 31, 33 (Ark. 1989). Probable cause is a question of law only when "the facts relied upon to create probable cause and the reasonable inferences to be drawn from the facts are undisputed." *Cox v. McLaughlin*, 867 S.W.2d 460, 464 (Ark. 1993).

The undisputed evidence at trial shows that at the time State Farm sued Hambrice it had information from the fire investigation that the fire had been caused by wires hanging from where neon lights had been removed and that Hambrice had been involved in removing the lights, was responsible for work which required the light removal, and had been working in the area where the fire started. The fire investigator had reported that Hambrice had been involved in removing the neon lights and that they had been removed to accommodate the installation of new siding on the restaurant, a job for which Hambrice was responsible. In interviews with Tucker, the

Daughertys had identified Hambrice as the general contractor responsible for the remodeling of the restaurant and said that the neon lights were removed under Hambrice's supervision. Based on this undisputed evidence concerning the facts State Farm had when deciding to sue Hambrice, it was reasonable for State Farm to believe that Hambrice was responsible for the fire, and it therefore did not lack probable cause.

Hambrice argues that this evidence does not establish probable cause because if State Farm had conducted a more thorough investigation, it would have discovered evidence of Daugherty's negligence and the fact that Hambrice was no longer the general contractor for the remodeling project. Under Arkansas law, however, a plaintiff is not required to uncover all facts relating to a claim before filing suit unless the plaintiff is aware of contradictory facts giving rise to a duty to investigate further. *Kansas & Texas Coal Co. v. Galloway*, 74 S.W. 521, 525 (Ark. 1903).

In this case, there do not appear to be any facts giving rise to a duty to investigate further, but even if there were, the additional evidence which Hambrice claims State Farm should have uncovered does not necessarily negate State Farm's evidence of Hambrice's negligence. State Farm had evidence indicating that Hambrice was directly responsible for the fire, including evidence that Hambrice was working in the area where the fire started and was involved in removing the lights, and it did not need to rely on a theory that Hambrice was liable as a general contractor. Moreover, uncovering evidence of Daugherty's negligence would not have vitiated State Farm's probable cause concerning Hambrice's negligence.

State Farm could still have had a submissible case in the subrogation action since under Arkansas law issues of comparative negligence are for the jury to decide. *Lockett v. International Paper Co.*, 871 F.2d 82, 84 (8th Cir. 1989). Hambrice thus did not show that State Farm lacked probable cause to sue him for subrogation.

Even if probable cause had been lacking, Hambrice was also required to make a separate showing of malice in order to establish his malicious prosecution claim. Arkansas law defines malice as "any improper or sinister motive for instituting the suit." *Hollingsworth*, 846 S.W.2d at 178 (quoting *Cordes*, 781 S.W.2d at 33). Malice can sometimes be inferred from a lack of probable cause when the surrounding circumstances indicate a sinister motive. *Cordes*, 781 S.W.2d at 34; *see, e.g., Farm Serv. Coop., Inc. v. Goshen Farms, Inc.*, 590 S.W.2d 861, 866 (Ark. 1979) (malice can be inferred when a company repeatedly sues another while lacking probable cause). Malice does not flow as a legal presumption from a lack of probable cause, however. *Cordes*, 781 S.W.2d at 33; *Rogers v. General Elec. Co.*, 341 F.Supp. 971, 976 (W.D.Ark.1972) (consider all facts disclosed in determining whether malice can be inferred from a lack of probable cause) (quoting *Kable v. Clark*, 204 S.W. 748, 750 (1918)).

Hambrice argues there is an inference of malice because of the lack of probable cause and State Farm's practice of pursuing subrogation claims. Undisputed evidence at trial showed that State Farm had credible facts on which it based its decision to sue Hambrice for subrogation, however. State Farm consulted a well-respected lawyer who had extensive experience in subrogation litigation, presented to him the facts it had uncovered in its

investigation, and only sued after the lawyer strongly recommended it. Moreover, once State Farm discovered evidence of Daugherty's negligence, it dismissed its action, even though under Arkansas law its case could probably still have been submitted to a jury. *See Lockett*, 871 F.2d at 84. These facts do not indicate any improper motive in bringing or pursuing the subrogation claim, and Hambrice did not make a sufficient showing of malice to withstand a motion for judgment as a matter of law.

Since Hambrice did not establish the elements of malicious prosecution, State Farm was entitled to judgment as a matter of law.[1] The judgment of the district court is reversed, and the case is remanded with instructions to enter judgment in favor of State Farm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1] It is therefore unnecessary to discuss the arguments raised by State Farm related to the jury instructions, evidentiary rulings, and damages.

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

WESTERN DISTRICT OF ARKANSAS

MILTON HAMBRICE, INC.

JUDGMENT IN A CIVIL CASE

v.

(Filed May 24, 1996)

STATE FARM FIRE & CASUALTY COMPANY

CASE NUMBER: 94-1133

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

On this 23rd day of May, 1996, on the claim of the plaintiff, Milton Hambrice, Inc., against the defendant, State Farm Fire & Casualty Company, we the jury find in favor of plaintiff Milton Hambrice, Inc. and assess damages in the following amounts:

$ 312,000.00 Compensatory Damages
$7,500,000.00 Punitive Damages

MAY 23 1996
Date

CHRISTOPHER R. JOHNSON
Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP.

on 5/24/96
By /s/ C. Nesbit

/s/ Carol Nesbit
(By) Deputy Clerk

VERDICT FORM 1

On the claim of the plaintiff, Milton Hambrice, Inc., against the defendant, State Farm Fire & Casualty Company, we the jury find in favor of plaintiff Milton Hambrice Inc. and assess damages in the following amounts:

$312,000.00 Compensatory Damages

$7,500,000.00 Punitive Damages

/s/ Michael R. Benefield
Foreperson

Date: 5-23-96

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2985WAED

Milton Hambrice, Inc.,	*	
	*	
Appellee,	*	Appeal from the United
vs.	*	States District Court for
State Farm Fire &	*	the Western District of
Casualty, Co.,	*	Arkansas
	*	
Appellant.	*	

The petition for rehearing filed by the appellee has been considered by the court and is denied.

June 27, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

App. 12

B-5. U.S. COURTS OF APPEALS
APPEALS TERMINATED ON THE MERITS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED MAR. 31, 1997

CIRCUIT AND NATURE OF PROCEEDING	TOTAL APPEALS TERMI-NATED	PERCENT OF TOTAL TERMI-NATIONS	TERMINATIONS ON THE MERITS						
			TOTAL	AFFIRMED/ ENFORCED	DISMISSED	REVERSED	REMANDED	OTHER	PERCENT REVERSED*
ALL CIRCUITS	51,522	52.8	27,179	21,899	2,002	2,432	666	180	9.1
CRIMINAL	10,493	68.9	7,229	6,223	351	436	192	27	6.0
U. S. PRISONER PETITIONS	4,465	50.5	2,255	1,928	165	101	48	13	4.5
OTHER U. S. CIVIL	4,377	60.1	2,629	2,132	102	314	66	15	11.9
PRIV. PRISONER PETITIONS	11,925	39.5	4,706	3,650	650	283	99	24	6.0
OTHER PRIVATE CIVIL	14,771	50.9	7,513	6,048	285	993	146	41	13.2
BANKRUPTCY	1,453	48.5	704	550	36	96	19	3	13.6
ADMINISTRATIVE APPEALS	3,368	47.3	1,594	876	374	191	96	57	12.0
ORIGINAL PROCEEDINGS	670	81.9	549	492	39	18	-	-	-
DISTRICT OF COLUMBIA	1,799	41.2	742	591	6	100	33	12	14.1
CRIMINAL	202	60.4	122	102	-	11	9	-	9.0
U. S. PRISONER PETITIONS	125	53.6	67	59	1	1	5	1	1.5
OTHER U. S. CIVIL	331	56.2	186	140	2	33	9	2	17.7
PRIV. PRISONER PETITIONS	78	44.9	35	33	-	1	1	-	2.9
OTHER PRIVATE CIVIL	245	49.8	122	93	-	22	2	5	18.0
BANKRUPTCY	14	42.9	6	4	-	2	-	-	-
ADMINISTRATIVE APPEALS	756	22.6	171	130	-	30	7	4	17.5
ORIGINAL PROCEEDINGS	48	68.8	33	30	3	-	-	-	-
FIRST CIRCUIT	1,338	52.1	697	596	17	28	42	14	4.1
CRIMINAL	359	59.1	212	187	1	9	15	-	4.2
U. S. PRISONER PETITIONS	80	42.5	34	27	-	4	2	1	11.8
OTHER U. S. CIVIL	124	47.6	59	53	-	1	5	-	1.7
PRIV. PRISONER PETITIONS	120	46.7	56	52	-	1	2	1	1.8
OTHER PRIVATE CIVIL	550	50.9	280	242	8	12	14	4	4.3
BANKRUPTCY	32	46.9	15	11	-	1	3	-	6.7
ADMINISTRATIVE APPEALS	60	53.3	32	15	8	-	1	8	-
ORIGINAL PROCEEDINGS	13	69.2	9	9	-	-	-	-	-
SECOND CIRCUIT	4,430	40.7	1,805	1,219	355	103	120	8	5.9
CRIMINAL	803	56.0	450	377	24	18	28	3	4.0
U. S. PRISONER PETITIONS	254	33.1	84	56	24	2	2	-	2.4
OTHER U. S. CIVIL	396	39.6	157	111	31	6	9	-	3.8
PRIV. PRISONER PETITIONS	815	36.3	296	144	123	14	13	2	4.7
OTHER PRIVATE CIVIL	1,718	37.0	635	424	93	54	63	1	8.5
BANKRUPTCY	148	33.8	50	36	6	4	4	-	8.0
ADMINISTRATIVE APPEALS	236	34.3	81	36	37	5	1	2	6.2
ORIGINAL PROCEEDINGS	60	86.7	52	35	17	-	-	-	-

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B-5. U.S. COURTS OF APPEALS
APPEALS TERMINATED ON THE MERITS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED MAR. 31, 1997

CIRCUIT AND NATURE OF PROCEEDING	TOTAL APPEALS TERMINATED	PERCENT OF TOTAL TERMINATIONS	TERMINATIONS ON THE MERITS						
			TOTAL	AFFIRMED/ ENFORCED	DISMISSED	REVERSED	REMANDED	OTHER	PERCENT REVERSED*
THIRD CIRCUIT	3,402	56.5	1,923	1,524	174	174	41	10	9.3
CRIMINAL	598	80.6	482	433	11	25	10	3	5.2
U. S. PRISONER PETITIONS	321	56.1	180	135	27	11	6	1	6.1
OTHER U. S. CIVIL	248	61.7	153	132	5	13	3	-	8.5
PRIV. PRISONER PETITIONS	734	40.9	300	174	91	25	8	2	8.3
OTHER PRIVATE CIVIL	1,233	52.3	645	514	35	84	10	2	13.0
BANKRUPTCY	88	51.1	45	37	1	6	1	-	13.3
ADMINISTRATIVE APPEALS	123	54.5	67	49	3	10	3	2	14.9
ORIGINAL PROCEEDINGS	57	89.5	51	50	1	-	-	-	-
FOURTH CIRCUIT	4,986	54.6	2,722	2,416	104	169	31	2	6.1
CRIMINAL	983	66.0	649	588	20	38	3	-	5.9
U. S. PRISONER PETITIONS	606	48.5	294	268	10	9	7	-	3.1
OTHER U. S. CIVIL	350	63.7	223	189	2	20	12	-	9.0
PRIV. PRISONER PETITIONS	1,524	47.3	721	644	56	16	3	2	2.2
OTHER PRIVATE CIVIL	1,084	57.4	622	548	12	60	2	-	9.6
BANKRUPTCY	209	30.1	63	53	2	7	1	-	11.1
ADMINISTRATIVE APPEALS	212	63.7	135	114	2	16	3	-	11.9
ORIGINAL PROCEEDINGS	18	83.3	15	12	-	3	-	-	-
FIFTH CIRCUIT	7,401	51.5	3,814	2,750	594	449	20	1	11.9
CRIMINAL	1,526	70.8	1,081	870	149	59	3	-	5.5
U. S. PRISONER PETITIONS	579	49.1	284	195	71	15	1	1	5.6
OTHER U. S. CIVIL	469	56.9	267	205	28	33	1	-	12.4
PRIV. PRISONER PETITIONS	2,385	33.4	797	452	283	60	2	-	7.5
OTHER PRIVATE CIVIL	1,800	57.8	1,041	808	46	177	10	-	17.0
BANKRUPTCY	202	52.5	106	85	7	14	-	-	13.2
ADMINISTRATIVE APPEALS	364	45.3	165	71	6	85	3	-	51.5
ORIGINAL PROCEEDINGS	76	96.1	73	64	4	5	-	-	-
SIXTH CIRCUIT	4,500	48.4	2,177	1,902	18	239	17	1	11.1
CRIMINAL	844	71.4	603	549	2	43	9	-	7.1
U. S. PRISONER PETITIONS	399	45.9	183	172	2	8	1	-	4.4
OTHER U. S. CIVIL	358	65.6	235	195	-	40	-	-	17.0
PRIV. PRISONER PETITIONS	1,093	26.9	294	273	2	17	1	1	5.8
OTHER PRIVATE CIVIL	1,486	46.1	685	566	5	111	3	-	16.2
BANKRUPTCY	83	38.6	32	22	3	7	-	-	21.9
ADMINISTRATIVE APPEALS	206	57.8	119	102	2	12	3	-	10.1
ORIGINAL PROCEEDINGS	31	83.9	26	23	2	1	-	-	-

B-5. U.S. COURTS OF APPEALS
APPEALS TERMINATED ON THE MERITS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED MAR. 31, 1997

CIRCUIT AND NATURE OF PROCEEDING	TOTAL APPEALS TERMI-NATED	PERCENT OF TOTAL TERMI-NATIONS	TERMINATIONS ON THE MERITS						
			TOTAL	AFFIRMED/ ENFORCED	DISMISSED	REVERSED	REMANDED	OTHER	PERCENT REVERSED*
SEVENTH CIRCUIT	3,200	50.3	1,609	1,291	53	193	35	37	12.1
CRIMINAL	619	64.1	397	297	44	39	10	7	9.8
U. S. PRISONER PETITIONS	388	43.6	169	147	2	14	6	-	8.3
OTHER U. S. CIVIL	196	62.8	123	94	2	15	6	6	12.2
PRIV. PRISONER PETITIONS	836	37.0	309	271	1	28	6	3	9.1
OTHER PRIVATE CIVIL	937	50.6	474	378	-	80	5	11	16.9
BANKRUPTCY	65	46.2	30	26	-	2	-	2	6.7
ADMINISTRATIVE APPEALS	126	60.3	76	52	1	13	2	8	17.1
ORIGINAL PROCEEDINGS	33	93.9	31	26	3	2	-	-	-
EIGHTH CIRCUIT	3,225	60.6	1,954	1,661	71	190	17	15	9.8
CRIMINAL	643	69.1	444	396	9	32	6	1	7.2
U. S. PRISONER PETITIONS	383	46.0	176	157	9	4	2	4	2.3
OTHER U. S. CIVIL	299	72.9	218	183	7	24	3	1	11.0
PRIV. PRISONER PETITIONS	851	53.5	455	398	23	30	1	3	6.6
OTHER PRIVATE CIVIL	852	62.1	529	423	18	87	-	1	16.4
BANKRUPTCY	83	71.1	59	47	2	8	2	-	13.6
ADMINISTRATIVE APPEALS	78	51.3	40	28	1	3	3	5	7.5
ORIGINAL PROCEEDINGS	36	91.7	33	29	2	2	-	-	-
NINTH CIRCUIT	8,701	55.8	4,856	3,671	483	363	278	61	7.7
CRIMINAL	1,624	70.3	1,142	924	55	73	80	10	6.4
U. S. PRISONER PETITIONS	619	63.2	391	363	6	7	14	1	1.8
OTHER U. S. CIVIL	817	58.8	480	387	12	61	16	4	12.7
PRIV. PRISONER PETITIONS	1,716	40.5	695	552	38	38	60	7	5.5
OTHER PRIVATE CIVIL	2,510	49.2	1,236	992	51	149	32	12	12.1
BANKRUPTCY	298	60.4	180	139	11	22	8	-	12.2
ADMINISTRATIVE APPEALS	952	60.7	578	163	309	11	68	27	1.9
ORIGINAL PROCEEDINGS	165	93.3	154	151	1	2	-	-	-
TENTH CIRCUIT	2,652	63.7	1,689	1,448	50	168	17	6	10.1
CRIMINAL	447	77.2	345	294	8	32	10	1	9.3
U. S. PRISONER PETITIONS	300	62.0	186	162	8	13	1	2	7.0
OTHER U. S. CIVIL	346	76.0	263	219	3	39	2	-	14.8
PRIV. PRISONER PETITIONS	566	60.2	341	292	25	21	1	2	6.2
OTHER PRIVATE CIVIL	778	54.6	425	372	1	50	2	-	11.8
BANKRUPTCY	74	54.1	40	28	1	10	-	1	25.0
ADMINISTRATIVE APPEALS	91	49.5	45	42	1	1	1	-	2.2
ORIGINAL PROCEEDINGS	50	88.0	44	39	3	2	-	-	-

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B-5. U.S. COURTS OF APPEALS
APPEALS TERMINATED ON THE MERITS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED MAR. 31, 1997

CIRCUIT AND NATURE OF PROCEEDING	TOTAL APPEALS TERMINATED	PERCENT OF TOTAL TERMINATIONS	TERMINATIONS ON THE MERITS						
			TOTAL	AFFIRMED/ ENFORCED	DISMISSED	REVERSED	REMANDED	OTHER	PERCENT REVERSED*
ELEVENTH CIRCUIT	5,888	54.2	3,191	2,830	77	256	15	13	8.1
CRIMINAL	1,845	70.6	1,302	1,206	28	57	9	2	4.4
U. S. PRISONER PETITIONS	411	50.4	207	187	5	12	1	2	5.8
OTHER U. S. CIVIL	443	59.8	265	224	10	29	-	2	10.9
PRIV. PRISONER PETITIONS	1,207	33.7	407	365	8	32	1	1	7.9
OTHER PRIVATE CIVIL	1,578	51.9	819	688	16	107	3	5	13.1
BANKRUPTCY	157	49.7	78	62	3	13	-	-	16.7
ADMINISTRATIVE APPEALS	164	51.8	85	74	4	5	1	1	5.9
ORIGINAL PROCEEDINGS	83	33.7	28	24	3	1	-	-	-

* PERCENT NOT SHOWN WHERE THE TOTAL NUMBER OF CASES TERMINATED ON THE MERITS IS LESS THAN 10. NO PERCENTAGES OF CASES REVERSED OR DENIED HAS BEEN COMPUTED FOR ORIGINAL PROCEEDINGS BECAUSE OF THEIR DIFFERENCE FROM APPEALS, NOR HAVE THEY BEEN INCLUDED IN THE PERCENTAGE OF TOTAL APPEALS REVERSED.

NOTE: TOTALS INCLUDE REOPENED, REMANDED, AND REINSTATED APPEALS AS WELL AS ORIGINAL APPEALS.

Federal Cases Reviewed

American Eagle Ins. Co. v. Thompson, 85 F.3d 327 (8th Cir. 1996) (jury verdict affirmed, reversed on other grounds).

Anheuser-Busch, Inc. v. John Labatt Ltd., 89 F.3d 1339 (8th Cir. 1996) (jury verdict affirmed).

BE&K Const. v. U.Bhd. of Carp. and Joiners, 90 F.3d 1318 (8th Cir. 1996) (jury verdict reversed).

Brine v. Dist. of Iowa, 90 F.3d 271 (8th Cir. 1996) (jury verdict reversed).

Buchanan v. Dehl Machine, Inc., 98 F.3d 366 (8th Cir. 1996) (jury verdict affirmed).

Butler v. French, 83 F.3d 942, (8th Cir. 1996) (jury verdict affirmed).

C.L. Maddox, Inc. v. The Renham Group, Inc., 88 F.3d 592 (8th Cir. 1996) (jury verdict affirmed).

Forster v. Boss, 97 F.3d 1127 (8th Cir. 1996) (jury verdict affirmed, reversed on other grounds).

Fox v. T-H Continental Ltd. Ptnshp., 78 F.3d 409 (8th Cir. 1996) (jury verdict reversed).

Gray v. Bicknell, 86 F.3d 1472 (8th Cir. 1996) (jury verdict affirmed).

Hardwick Air Masters, Inc. v. Lennox Ind., 78 F.3d 1333 (8th Cir. 1996) (jury verdict reversed).

Haynes v. Bee-Line Trucking Co., 80 F.3d 1235 (8th Cir. 1996) (jury verdict affirmed).

Jackson v. Delta Special School Dist., 86 F.3d 1489 (8th Cir. 1996) (jury verdict reversed).

Jones Truck Lines v. Full Service Leasing Corp., 83 F.3d 253 (8th Cir. 1996) (jury verdict affirmed).

Kaplon v. Howemedica, Inc., 83 F.3d 363 (8th Cir. 1996) (jury verdict reversed).

Karcher v. Emerson Electric Co., 94 F.3d 502 (8th Cir. 1996) (jury verdict affirmed on compensatory damages; reversed on punitive damages).

Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095 (8th Cir. 1996) (jury verdict affirmed).

Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996) (jury verdict reversed).

Lundell Mfg. Co. v. ABC, Inc., 98 F.3d 351 (8th Cir. 1996) (jury verdict affirmed).

McKay v. Wiltell Comm. Systems, Inc., 86 F.3d 970 (8th Cir. 1996) (jury verdict affirmed).

Mears v. Nationwide Mut. Ins. Co., 91 F.3d 1118 (8th Cir. 1996) (jury verdict affirmed).

Nat'l Farmers Union v. Souris River Tele., 75 F.3d 1268 (8th Cir. 1996) (jury verdict reversed).

Nelson v. J.C. Penney Co., 75 F.3d 343 (8th Cir. 1996) (jury verdict reversed).

Parrish v. Immanuel Medical Ctr., 92 F.3d 727 (8th Cir. 1996) (jury verdict affirmed).

Rail Intermodal Spec. v. Gen'l Electric Cap., 103 F.3d 627 (8th Cir. 1996) (jury verdict reversed).

Rudolph v. Metro. Airports, 103 F.3d 677 (8th Cir. 1996) (jury verdict affirmed and reversed).

Ryther v. KARE II, 84 F.3d 1074 (8th Cir. 1996) (jury verdict affirmed).

Scott Fezer Co. v. Williamson, 101 F.3d 549 (8th Cir. 1996) (jury verdict affirmed on liability; reversed on damages).

Shaw v. HCA Health Services of Midwest, Inc., 79 F.3d 99 (8th Cir. 1996) (jury verdict affirmed).

Sherlock v. Quality Control Equipment Co., 79 F.3d 731 (8th Cir. 1996) (jury verdict affirmed).

Simeone v. First Nat. Assn., 73 F.3d 184 (8th Cir. 1996) (jury verdict affirmed).

Simmons Poultry Farms v. Dayton Ro. De. Co., 82 F.3d 217 (8th Cir. 1996) (jury verdict reversed).

Stemmons v. Miss. Dept. of Corrections, 82 F.3d 817 (8th Cir. 1996) (jury verdict affirmed).

Stewart v. M.D.F., Inc., 83 F.3d 247 (8th Cir. 1996) (jury verdict affirmed).

Swanson v. White Consolidated Ind., Inc., 77 F.3d 223 (8th Cir. 1996) (jury verdict affirmed).

Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996) (jury verdict reversed).

United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563 (8th Cir. 1996) (jury verdict affirmed).

Varner v. Nat'l Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996) (jury verdict affirmed).

Venture Properties v. First Southern Bank, 79 F.3d 90 (8th Cir. 1996) (jury verdict affirmed).

Wright v. Willoumette Inc., Inc., 91 F.3d 1005 (8th Cir. 1996) (jury verdict reversed).